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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WENDY HENRIQUEZ, Plaintiff and Respondent, v. SALLY LIU, Defendant and Appellant.	A154302 (City & County of San Francisco Super. Ct. No. CGC-16-550572)

Plaintiff Wendy Henriquez sued her landlord, defendant Sally Liu, for failing to repair defects in the leased premises. Liu cross-complained against Henriquez and her husband, Derik Aquino, for indemnity and property damage. Liu also filed a separate unlawful detainer action against Henriquez and Aquino, which concluded with a judgment in favor of Henriquez and Aquino based on their defense that Liu failed to provide habitable premises. After a trial on Henriquez's complaint, the trial court entered judgment in favor of Henriquez and awarded her damages for repair costs and emotional distress. The court also awarded treble damages based on its finding that Liu acted in bad faith.

On appeal, Liu argues the trial court erred by: (1) improperly taking judicial notice of or giving collateral estoppel effect to a factual finding made in the unlawful detainer action; (2) failing to grant Liu's request for a statement of decision; (3) proceeding to trial while Aquino was in default on Liu's cross-complaint; and (4) finding that Liu acted in bad faith and awarding emotional distress damages to Henriquez. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Henriquez was a tenant of residential real property owned by Liu. In February 2016, Henriquez filed a lawsuit against Liu for several causes of action alleging defects in the leased premises.[1] The claimed defects included leaks from the roof causing damage to the ceiling, water intrusion damage, hazardous and defective plumbing installations and fixtures, and windows that did not open or close properly. The complaint further alleged that Henriquez did not have adequate heat because the heating unit in the premises leaked carbon monoxide and had to be removed, and Liu failed to provide a new heater despite having notice of the problem for almost a year.

Liu filed a cross-complaint against Henriquez and Aquino for indemnity and property damage. She alleged that any damages claimed in the underlying complaint were caused by Aquino and Henriquez. Henriquez demurred to the cross-complaint on the grounds of uncertainty and failure to state a cause of action.[2] On December 5, 2016, the trial court sustained the demurrer with leave to amend, but Liu never filed an amended cross-complaint.

On December 15, 2016, default was entered against Aquino on Liu's cross-complaint. However, Liu never sought or obtained a default judgment against Aquino.

During the pendency of Henriquez's action, Liu filed a separate action against Henriquez and Aquino for unlawful detainer, and a trial was held in early July 2017.[3] In their defense, Henriquez and Aquino claimed that Liu failed to provide habitable

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[1] These causes of action were as follows: breach of the implied warranty of habitability; violation of statutes (Civ. Code, §§ 1941.1, 1941.3, 1942.4; Health & Saf. Code, § 17920.3; Bus. & Prof. Code, § 17200); and breach of the San Francisco Administrative Code, Residential Rent Stabilization and Arbitration Ordinance, §§ 37.10, 37.11A; negligence; breach of contract; and intentional infliction of emotional distress.

[2] We deferred consideration of Liu's request for judicial notice of the brief supporting the demurrer until resolution of the merits of the appeal. We now deny the request, as the record on appeal already contains a copy of this brief.

[3] No records or transcript from the unlawful detainer, other than the judgment, are included in the instant record on appeal.

premises. In the July 10, 2017, judgment, the trial court found that Liu had breached the covenant to provide habitable premises due to her failure to provide effective waterproofing and weather protection of the roof, windows, and doors, continuous and uninterrupted heating facilities, and a locking mail box. The court awarded Henriquez and Aquino a reduction of $1,100.00 in monthly rent, and held jurisdiction over the matter until repairs were made.

Trial on Henriquez's complaint commenced in December 2017. At the outset of trial, the court severed Liu's cross-complaint due to her failure to amend it following the order sustaining the demurrer. On December 21, the trial court issued its "Order and Verdict Re: Court Trial" finding in favor of Henriquez on her claims for negligence, breach of the implied warranty of habitability and the lease agreement, and violation of the San Francisco's rent control ordinance, Civil Code sections 1941.1 and 1941.3, and Health and Safety Code section 17920.3.[4]

Specifically, the court found "the evidence was overwhelming that despite a notice of violation issued by the SF Housing Dept. almost two years previously, defendant failed to repair the significant and extensive leaks in the Subject unit # 2, which resulted in major water damage and mold creating significant health and safety hazards that were not abated until November 2017, shortly before this trial. Additionally, as was previously adjudicated by this Court, [Henriquez] and her young children were without adequate heat due to a dangerous wall heater that defendant failed to replace or fix for almost a year. At times they were so cold that they took refuge in the other tenants' units and [Henriquez] could not sleep at night worrying about her children's well-being." The court awarded Henriquez emotional distress damages in the amount of $10,000, trebled

[4] Health and Safety Code section 17920.3 provides that a dwelling in which there exists any of several listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or occupants is deemed and declared a substandard building. The list of conditions includes lack of adequate heating (Health & Saf. Code, § 17920.3, subd. (a)(6)), dampness of habitable rooms (*id*., subd. (a)(11)), visible mold growth (*id*., subd. (a)(13)), and faulty weather protection (*id*., subd. (g)).

pursuant to the rent ordinance, and $250.00 in costs incurred by Henriquez to fix the defects, also trebled.

As for Henriquez's claim for intentional infliction of emotional distress, the trial court ruled in favor of Liu. The court found that Henriquez failed to prove that Liu's conduct was extreme and outrageous.

Thereafter Liu filed a request for a statement of decision. The record does not disclose whether the trial court responded to the request. Previously however, the court stated in its order and verdict that "[t]he trial concluded in less than eight hours of testimony and argument. No statement of decision was timely requested."

Liu moved for a new trial, but her motion was denied.

Liu timely appealed.

DISCUSSION

A judgment or order of the trial court is presumed to be correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) The appellant bears the burden to provide an adequate record on appeal. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Matters presenting pure questions of law not involving the resolution of disputed facts are subject to de novo review. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) When engaging in substantial evidence review, we determine whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, supporting the judgment. (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 506 (*Minnegren*).)

Liu has elected to proceed in this appeal without a reporter's transcript of the trial or any records or transcripts of the unlawful detainer proceeding other than the judgment. "Where no reporter's transcript has been provided, and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported . . . testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's

transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

A. Factual Findings from the Unlawful Detainer Action

Liu argues the trial court improperly took judicial notice of or gave collateral estoppel effect to a finding in the unlawful detainer judgment that she did not provide continuous and uninterrupted heat, and the court then misstated this finding by concluding that Liu failed to repair a "dangerous wall heater." Liu argues the issue of the wall heater's condition should not have been given collateral estoppel effect because she had no incentive to vigorously litigate it in the unlawful detainer action, during which only defenses relating to the question of possession were permitted.

Liu fails to provide an adequate record to show error. Without a reporter's transcript of the trial, and with no indication in the record otherwise, we assume from the trial court's express findings that the dangerous condition of the wall heater was supported by substantial evidence at trial. Indeed, Henriquez's complaint expressly alleged the heating unit's dangerousness, so it was a relevant trial issue. Liu's claim of error appears to be based on the trial court's use of the phrase "as was previously adjudicated by this Court." Indulging all presumptions in favor of the judgment however (*Denham*, *supra*, 2 Cal.3d at p. 564), we interpret this remark to reflect the court's observation that its finding was consistent with the actual previously-adjudicated finding in the unlawful detainer.

Even if the trial court gave collateral estoppel effect to that finding, Liu again fails to provide an adequate record to show error. Because Liu has not provided any records or transcripts from the unlawful detainer other than the judgment, she has not provided an adequate record to show the issue was not fully adjudicated in that proceeding. (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.) And we reject her contention that the unsafe condition of the wall heater was necessarily beyond the scope of the unlawful detainer. Although an unlawful detainer judgment "usually has very limited res judicata effect," the " 'full and fair' litigation of an affirmative defense—even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity

to litigate is provided—will result in a judgment conclusive upon issues material to that defense." (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 256–257.) Contrary to Liu's contentions, breach of the implied warranty of habitability is a proper defense in an unlawful detainer action, and the warranty of habitability requires compliance with applicable building and housing code standards which materially affect health and safety. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635, 637.) Thus, the unsafe condition of the wall heater was likely germane to the habitability defense in the unlawful detainer.

Finally, any perceived error in the application of collateral estoppel was harmless. (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 871.) In addition to the wall heater finding, the trial court found that Liu failed to repair "significant and extensive leaks" resulting in "major water damage and mold creating significant health and safety hazards" in the leased premises, despite having knowledge of these defects for almost two years. These findings alone supported the judgment that Liu breached the warranty of habitability and violated her contractual and statutory duties.

B. Statement of Decision

Liu argues the trial court erred in failing to grant her request for a statement of decision. Liu contends the total trial time was more than eight hours, and thus, her post-trial request was not untimely and should have been granted.

A request for a statement of decision "must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision." (Code Civ. Proc., § 632 (section 632).)

Liu did not comply with section 632. She acknowledges the trial court's minutes reflect a total trial time of less than eight hours but contends these records are unreliable because the court clerk was under no duty to keep accurate time records. This speculative argument is unworthy of serious consideration. She also contends that, according to her own calculations, the trial lasted approximately 12 hours. However, the

trial court's minutes constitute substantial evidence in support of its finding that trial concluded in less than eight hours.

Liu relies on *Bevli v. Brisco* (1985) 165 Cal.App.3d 812 (*Bevli*) to contend that the trial time should include time spent outside of open court, such as any time spent by the trial judge in reviewing the evidence and the law. *Bevli* held that where the trial court spent more than 13 hours perusing an administrative record, this time should have been considered as trial time for purposes of section 632. (*Bevli*, at pp. 821–822.) But *Bevli* is distinguishable as involving not only an administrative mandamus proceeding but a former version of section 632 that lacked the eight-hour rule and simply referred to trials lasting "less than one day." (*Id*. at pp. 819–820.) *In re Marriage of Gray* (2002) 103 Cal.App.4th 974 (*Gray*) refused to extend *Bevli*'s timing rule to other civil proceedings in light of the 1987 amendment to section 632, which established the eight-hour rule. (*Gray*, at pp. 979–980.) *Gray* concluded that, for civil proceedings other than administrative mandamus, the time of trial for purposes of section 632 "means the time that the court is in session, in open court" and includes recesses when the parties remain at the courthouse, but excludes time spent by the judge off the bench without the parties present, such as during lunch. (*Id*. at p. 980.) In light of *Gray*, we reject Liu's argument that the total trial time should have included time spent outside of open court.

Accordingly, Liu fails to demonstrate that the trial court erred in concluding the total trial time was less than eight hours. Because her request was not made prior to the submission of the matter for decision, the court was not required to issue a statement of decision. (§ 632.)

C. Entry of Default Against Aquino

Liu argues the trial court erred by proceeding to trial on Henriquez's complaint while Aquino was in default on the cross-complaint. According to Liu, Aquino's default necessarily established the truth of all material allegations of the cross-complaint, and because he and Henriquez were in privity, Henriquez should have been collaterally estopped from relitigating the issue of Liu's responsibility for the defects he alleged.

This argument fails for the simple reason that Liu never obtained a default judgment against Aquino. " '[A] default *judgment* conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment[.]' " (*Four Star Electric, Inc. v. F&H Construction* (1992) 7 Cal.App.4th 1375, 1380, italics added.) Without a default judgment in the prior proceeding, the requisite element of finality for collateral estoppel purposes is lacking. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [decision in prior proceeding must be final].) By itself, the entry of default merely terminated Aquino's right to take further steps in the litigation until either the default was set aside or a default judgment was entered. (*Devlin v. Kearny Mesa Amc/Jeep/Renault* (1984) 155 Cal.App.3d 381, 385.) Liu cites no authority that the mere entry of default against a cross-defendant has any collateral estoppel effect or precludes a non-defaulting co-cross-defendant from proceeding to trial.

D. The Finding of Bad Faith and Award of Emotional Distress Damages

Liu argues the trial court erred in finding she acted in bad faith because there was no relevant evidence of her bad faith, and the finding was contradicted by the separate finding that Liu's conduct was not extreme or outrageous. Liu further argues that Henriquez cannot recover damages for mold-related distress as a matter of law.

Once again, Liu's failure to provide a trial transcript dooms her sufficiency-of-the-evidence challenges. (*Estate of Fain, supra*, 75 Cal.App.4th at p. 992.) Liu nevertheless cites to her declaration in support of her new trial motion, wherein she states she provided Henriquez with a portable heater immediately upon learning about the defective wall heater. Even assuming the declaration accurately reflects Liu's trial testimony, we must simply determine whether substantial evidence, *disputed or not*, supports the verdict. (*Minnegren, supra*, 4 Cal.App.5th at p. 506.) In the absence of a trial transcript, we presume substantial evidence supported the finding of bad faith. (*Estate of Fain*, at p. 992.)

Nor are we persuaded by Liu's claim that reversible error occurred because the finding of bad faith was inconsistent with the finding that, for purposes of Henriquez's claim for intentional infliction of emotional distress (IIED), Liu's conduct was not extreme or outrageous. Liu relies on *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, which defined "bad faith" in the context of a claim of bad faith breach of contract. Assuming that definition applies here, it simply describes bad faith in relevant part as "the conscious doing of a wrong because of dishonest purpose or moral obliquity." (*Id*. at p. 764.) "Outrageous conduct" for IIED purposes is defined as conduct that is " 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' " (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.) Whether a landlord's knowing, intentional and willful failure to correct defective conditions of the premises constitutes extreme and outrageous conduct for purposes of IIED "presents a factual question." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 922.) Here, the trial court determined that Liu acted in a conscious and morally blameworthy manner, but also that her conduct was not so extreme as to exceed all bounds tolerated in a civilized community. We see no inconsistency between these findings that compels reversal, particularly in the absence of a trial transcript that would disclose the evidence actually considered by the court.

We also reject Liu's claim that Henriquez was barred as a matter of law from recovering emotional distress damages. A tenant who is required to pay rent while the leased premises is in a substandard condition may bring an action under Civil Code section 1942.4[5] to recover actual damages, which includes damages for emotional

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[5] Civil Code section 1942.4, subdivision (a), provides, in relevant part: "A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three–day notice to pay rent or quit . . . if all of the following conditions exist prior to the landlord's demand or notice: [¶] (1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 [of the Civil Code] or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling. [¶] (2) A

distress. (*McNairy v. C.K. Realty* (2007) 150 Cal.App.4th 1500, 1506.) Henriquez relied upon Civil Code section 1942.4 in her complaint and the trial court found, consistent with liability under this statute, that Liu violated Health and Safety Code section 17920.3; that she had been given almost two years' notice of the defective conditions from city health officials; and that she waited until the eve of trial to abate the defects.

For the first time on appeal, Liu argues that Health and Safety Code section 17920.3, subdivision (a)(13) (listing visible mold growth as a substandard building condition), does not apply in this case because the statutory amendment adding this subdivision took effect on January 1, 2016, "after all or nearly all of the events cited in the February 23, 2016 complaint." Not only has Liu forfeited this contention by not presenting it below (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 805, fn. 9), but the claim is lacking in merit. The trial court found that the hazards caused by the water and mold damage were not abated until November 2017, long after the amendment adding subdivision (a)(13) took effect. Moreover, the court found the premises suffered from several conditions listed in Health and Safety Code section 17920.3 other than mold growth.

Finally, Liu's reliance on Health and Safety Code section 26147, subdivision (b), is unavailing. This statute requires residential landlords who know or have reasonable cause to believe that mold is present in an affected unit to provide tenants with written disclosures of the mold's presence. (*Id*., subd. (a).) Although the statute does not require landlords to test for mold (*id.*, subd. (b)), Liu points to no authority precluding a landlord's liability for emotional distress damages where the landlord knowingly and for

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public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions. [¶] (3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. . . . [¶] (4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2."

a substantial period of time fails to remedy major water damage and mold causing significant health and safety hazards in the leased premises.

DISPOSITION

The judgment is affirmed. Henriquez shall recover her costs on appeal.

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Fujisaki, J.

WE CONCUR:

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Siggins, P. J.

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Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.